IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JERRY BINKLEY and KAREN BINKLEY, husband and wife, Plaintiffs/Appellants, v. PINAL COUNTY; DAVID KOHL, in his official capacity as Director of Planning & Zoning; GEORGE P. AROS and TRACY LEE AROS, husband and wife, Defendants/Appellees.	2 CA-CV 2007-0096 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV2004-00265

Honorable Kevin D. White, Judge

AFFIRMED

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Appellees Aroses

H O W A R D, Presiding Judge.

¶1 In this action for injunctive relief and damages, appellants Jerry Binkley and Karen Binkley (Binkleys) appeal the grant of summary judgment in favor of appellees Pinal County; David Kohl, in his official capacity as Director of Planning and Zoning; and George and Tracy Lee Aros (Aroses), neighboring landowners to Binkleys. Binkleys claim the trial court erred by concluding that they had failed to exhaust their administrative remedies with regard to a dispute over the proper interpretation of the county zoning ordinance. Finding no error in the trial court's decision, we affirm.

¶2 The relevant facts are undisputed. In 1995, Aroses acquired property that included an equestrian arena. Aroses began using the arena to host roping events. In 1997, Binkleys acquired title to property that shares a portion of the boundary of Aroses' property. From 1998 to 2001, Binkleys complained to various County officials that Aroses' property was not in compliance with the County's zoning ordinance. Various County officials rendered official written decisions that Aroses' use of the property was in compliance.

¶3 Binkleys subsequently filed a complaint in superior court. It is undisputed that Binkleys did not appeal to the Pinal County Board of Adjustment and Appeals before filing

their lawsuit and that the Board had not been involved in responding to Binkleys' complaints. Aroses filed a motion for summary judgment, which the County joined, contending Binkleys had failed to exhaust their administrative remedies. The trial court agreed that Binkleys had failed to exhaust their administrative remedies and that primary jurisdiction is in the Pinal County Board of Adjustment and Appeals, granting summary judgment against Binkleys. Binkleys appeal that decision.

¶4 Binkleys argue that the trial court erred by determining that they had failed to exhaust their administrative remedies. "A party must exhaust available administrative remedies 'before appealing to the courts.'" *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 12, 36 P.3d 1208, 1212 (App. 2001), *quoting Minor v. Cochise County*, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980).

> Where a board is specifically empowered to act by the Legislature, the board should act before recourse is had to the courts. The doctrine of exhaustion of administrative remedies applies where a claim is cognizable in the first instance by the administrative agency alone. In such cases, judicial interpretation is withheld until the administrative process has run its course.

Minor, 125 Ariz. at 172, 608 P.2d at 311 (citation omitted). In the absence of disputed facts, whether a party has exhausted available administrative remedies is a legal question and we thus review the trial court's decision de novo. *See Sw. Soil Remediation*, 201 Ariz. 438, ¶¶ 12, 15-16, 36 P.3d at 1212 (reviewing de novo whether party had exhausted

administrative remedies).[1] If a party fails to exhaust administrative remedies, the courts will decline to exercise jurisdiction. *Id*. ¶ 14.

¶5 Section 11-807(A), A.R.S., states that each county shall have a board of adjustment. Section 11-807(B)(1) provides, in relevant part, that the board is empowered to "[i]nterpret the zoning ordinance when the meaning of any word, phrase or section is in doubt [or] when there is dispute between the appellant and enforcing officer." Section 11-807(C) provides, in relevant part, that "[a]ppeals to an adjustment board may be taken by any person who feels that there is error or doubt in the interpretation of the ordinance." Finally, § 11-807(D) provides that "[a]ny person aggrieved in any manner by an action of a board of adjustment may within thirty days appeal to the superior court."

¶6 In *Minor*, the supreme court determined that § 11-807 provides an administrative remedy that must be exhausted before a party may seek relief from the courts.

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[1]Some cases state that the failure to exhaust administrative review is jurisdictional, *see, e.g., Mountain View Pioneer Hosp. v. Employment Sec. Comm'n*, 107 Ariz. 81, 85, 482 P.2d 448, 452 (1971); *Moulton v. Napolitano*, 205 Ariz. 506, ¶ 9, 73 P.3d 637, 642 (App. 2003), while others address it as a matter of judicial administration subject to exceptions. *See, e.g., Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420, 880 P.2d 639, 640 (App. 1993); *Zeigler v. Kirschner*, 162 Ariz. 77, 85-86, 781 P.2d 54, 62-63 (App. 1989). In this case, we do not need to decide whether failure to exhaust administrative remedies is "jurisdictional." We do note that our supreme court has observed that the courts sometimes "'indiscriminately use the term jurisdiction (the power to act) when what is meant is legal error (the court acted improperly),'" *Estes v. Superior Court*, 137 Ariz. 515, 517, 672 P.2d 180, 182 (1983), *quoting In re Marriage of Hinkston*, 133 Ariz. 592, 595, 653 P.2d 49, 52 (App. 1982), and that "[m]isinterpreting a procedural matter amounts to legal error which may result in reversal by an appellate court, but subject matter jurisdiction remains unaffected by the misinterpretation." *Id*.

Minor, 125 Ariz. at 172-73, 608 P.2d at 311-12. The plaintiffs in that case had failed to appeal to the Board of Adjustment to challenge the issuance of a permit. *Id.* at 171, 608 P.2d at 310. The supreme court concluded that the plaintiffs' special action challenging the permit had to be dismissed. *Id.* at 171-73, 608 P.2d at 310-12.

¶7 Pinal County has established a Board of Adjustment and Appeals pursuant to § 11-807. *See* Pinal County Zoning Ordinance, art. 24. It is undisputed that Binkleys received several interpretations of the County zoning ordinance from various County officials responsible for enforcing the ordinance. Binkleys believe "there is error . . . in the interpretation of the ordinance," § 11-807(C), and are in a "dispute" with the "enforcing officer[s]," § 11-807(B)(1). Section 11-807 expressly provided Binkleys with an administrative remedy, that is, an appeal to the Board of Adjustment and Appeals. Binkleys have not filed such an appeal, therefore, they have not exhausted their administrative remedies. *See Minor*, 125 Ariz. at 172, 608 P.2d at 311.

¶8 Binkleys argue, however, that an appeal to the Board of Adjustment and Appeals was unnecessary because that same Board previously had ruled on the precise zoning question at issue in this case. They apparently believe this makes any appeal "futile" under *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988).

¶9 Binkleys cite the minutes of a 2001 meeting in which the Board ruled that "[a]n Equestrian arena constitutes a sports arena and therefore it is not allowed in the [General Rural (GR)] zone and requires a Special Use Permit." Subsequent to this ruling,

Binkleys again complained to County officials about Aroses' property. In response, Binkleys received a letter from the County planning director stating that the Board's ruling could not be applied retroactively and that roping arenas in existence before the ruling were "a legally permitted use" under the zoning ordinance.

¶10 Binkleys disagree with the planning director's interpretation of the zoning ordinance and are in a dispute with the official. The Board of Adjustment and Appeals has the power to provide relief in this matter. "'[A]dministrative action cannot be deemed futile if [an] agency has the power to provide some relief.'" *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, ¶ 31, 165 P.3d 194, 202 (App. 2007), *quoting Moulton*, 205 Ariz. 506, ¶ 24, 73 P.3d at 645. Thus, as before, Binkleys had an administrative remedy to pursue: an appeal to the Board of Adjustment and Appeals. *See* § 11-807.

¶11 Binkleys also argue that a party is not required to exhaust administrative remedies when "objective and undisputed evidence establishes administrative bias which would render pursuit of administrative remedy futile," again relying on *White Mountain Apache Tribe*, 840 F.2d at 677-78. They claim the evidence "prove[s] a clear administrative bias against [them] and demonstrate[s] Pinal County's employees[']refusal to enforce its own existing zoning ordinances." They further assert that they "not only exhausted their administrative remedies, they were pointedly rebuffed and told to 'get lost.'" But the Board of Adjustment and Appeals is the final administrative decision-maker with respect to this issue. *See* § 11-807. And Binkleys have not pointed to any evidence that either the Board

as a whole or any individual member of the Board has done anything to demonstrate bias or to convey a preannounced decision against Binkleys. Therefore, they have failed to show bias under *White Mountain Apache Tribe*. 840 F.2d at 677-78.

¶12 Relying on *Wonders v. Pima County*, 207 Ariz. 576, 89 P.3d 810 (App. 2004), a primary jurisdiction case, Binkleys contend that, because of the Board's 2001 decision that roping arenas require special use permits in GR zoning, "there is nothing left for the Board of Adjustment and Appeals to interpret and no administrative remedy for [Binkleys] to pursue." They assert that only enforcement of the ordinance is at issue. But a dispute exists between Binkleys and the County's planning director regarding whether the Board's interpretation of a zoning ordinance applies to roping arenas already in existence, such as Aroses'.

¶13 Binkleys also suggest, at least impliedly, that the superior court could have exercised its jurisdiction without requiring an appeal to the Board of Adjustment and Appeals because Pinal County Zoning Ordinance § 2715 provides for private enforcement and, therefore, concurrent jurisdiction. When the administrative agency and the court have concurrent jurisdiction, the doctrine of primary jurisdiction controls the court's exercise of that jurisdiction. *See Coconino County v. Antco, Inc.*, 214 Ariz. 82, ¶ 14, 148 P.3d 1155, 1160 (App. 2006). Here, the superior court found that the administrative agency had primary jurisdiction.

¶14 The primary jurisdiction doctrine is "closely allied" to the exhaustion of administrative remedies doctrine. *Sw. Soil Remediation,* 201 Ariz. 438, ¶ 12, 36 P.3d at 1212. The primary jurisdiction doctrine applies when an administrative agency and the superior court have concurrent jurisdiction and resolves "'who should initially determine a case.'" *Id.* ¶ 13, *quoting Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420, 880 P.2d 639, 640 (App. 1993) (emphasis omitted). When a case involves factual questions """not within the conventional experience of judges,""" the agencies that have been established to regulate the subject matter at issue, and that possess specialized expertise in such subject matter, """should not be passed over.""" *Id., quoting Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 430, 586 P.2d 987, 991 (App. 1978), *quoting Far East Conference v. United States*, 342 U.S. 570, 574 (1952). We review a trial court's decision to invoke the primary jurisdiction rule for an abuse of discretion. *See Wonders*, 207 Ariz. 576, ¶¶ 5, 8, 89 P.3d at 812.

¶15 The Board of Adjustment and Appeals was established to regulate the subject matter at issue in this case and possesses a specialized expertise. *See* § 11-807. Therefore, it should not be passed over. *See Sw. Soil Remediation*, 201 Ariz. 438, ¶ 13, 36 P.3d at 1212. If concurrent jurisdiction does exist, the trial court did not abuse its discretion in finding that primary jurisdiction should rest with the Board of Adjustment and Appeals.

¶16 Binkleys have not exhausted the administrative remedies available to them, and the superior court did not abuse its discretion in according primary jurisdiction of this matter

to the Board of Adjustment and Appeals. Consequently, we affirm the superior court's judgment in favor of Pinal County, Kohl, and Aroses.[2] Because Binkleys are not prevailing parties, we deny their request for attorney fees.[3]

¶17 Aroses also requested attorney fees, costs, and expenses pursuant to A.R.S. § 12-349, without elaboration. Aroses bore the burden of showing, by a preponderance of the evidence, the existence of the statutory grounds for their request. *See City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, ¶ 27, 20 P.3d 590, 598 (App. 2001). They have failed to do so, and we deny their request.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge

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[2]We note that Binkleys argue for the first time in their reply brief that the trial court should have "recognize[d] that a public and private nuisance can still be found for a lawful land use and/or activity." We do not address arguments raised for the first time in the reply brief. *Ariz. Dep't of Revenue v. Ormond Builders, Inc.*, 216 Ariz. 379, n.7, 166 P.3d 934, 940 n.7 (App. 2007).

[3]Binkleys also requested oral argument in their opening brief. This request was not made in conformance with the requirements of Rule 18, Ariz. R. Civ. App. P. We further conclude that "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." *Id.* We therefore reject Binkleys' request.